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INJUNCTION—RIGHTS OF PRIVACY—ENFORCEMENT IN EQUITY.—*Roberson* v. *Rochester Folding Box Co., et al.*, 64 N. E. Reporter, 442 (Court of Appeals of New York, June 27, 1902). In the constant transitions and ceaseless expansion of the law to adapt itself to the conditions of modern life, new and definite possibilities are continually seeking admission into the broad area of legal conceptions. Originating in the inventive mind of an energetic attorney or produced by the genius of some legal expert these theories assume form and figure and, by appearing in a series of cases, not precisely involving them or requiring their definite acceptance or rejection, lead us to think, sometimes erroneously enough, that they have become part and parcel of the law itself. No case can therefore be more interesting or important than one which finally presents as a definite issue, the validity,—or invalidity,—of such an interloping principle and compels the court to meet it face to face for a final determination. The invigorating stamp of the judicial sanction must then be either extended or refused; in either event the

result is a clearing of the legal atmosphere and a dissipation of doubt and uncertainties.

Roberson v. *Rochester Folding Box Company* decided in the Court of Appeals of New York during the current year, is such a case. It was there definitely held that in the law of New York at least "the right of privacy," called at times "the right to be let alone," has no place or recognition. Ever since the earliest enunciation of this doctrine in the *Harvard Law Journal* in 1890 (Vol. IV) efforts had been made to incorporate it into the body of the New York state law, but the question was never squarely raised until presented by the present case.

It appeared from the complaint that the defendant was a milling company engaged in the manufacture of flour and that, having in some way secured the picture of the plaintiff, it had without her knowledge or consent "made, printed, sold and circulated about 25,000 lithographic prints" and copies thereof for advertising purposes. Over the photograph in every instance were printed the words "Flour of the Family" and below was the name of the defendant company. These posters were placed indiscriminately in stores, saloons and other public places throughout the neighborhood. The plaintiff alleged "that her good name had been attacked, causing her great distress and suffering, both in body and mind, that she had been made sick and suffered a severe nervous shock, was confined to her bed and had to summon a physician." She prayed therefore that the defendants be enjoined from a further publication of her picture and asked also for damages to the amount of $15,000. The injunction was granted by the trial judge and the Appellate division unanimously affirmed this decision, but the Court of Appeals by a vote of four to three reversed the judgment because in its opinion the complainant had failed to state a true cause of action.

In view of the fact that the Court was practically adjudicating *res nova* and that a vigorous minority opinion, concurred in by two other justices, was delivered by Mr. Justice Gray, it will be profitable to investigate the grounds upon which the court placed its decision. After the fact had been noted that the so-called "right of privacy" had received no mention whatsoever in the writings of the early commentators on the law, a review of the most analogous cases resulted in the conclusion that recent decisions had failed to give it a place in modern jurisprudence. The court declared itself to be unwilling to assume the responsibility of making an innovation which necessitated what it felt to be a decided departure from the common law and therefore banishing from consideration this right of privacy it refused to grant the relief sought because neither the common law nor equity presented any other principle which unequivocally controlled the case.

The question is at once suggested, What are the several grounds upon which the Court of Equity will assume jurisdiction in such cases? In the first place it will interpose by injunction to prevent a breach of a contract, express or implied. There is no better illustration of this group of decisions than *Pollard* v. *Photograph Company,* 40 Ch. Div. 345, 1888, where the defendant company after taking the plaintiff's picture for which it was duly paid, struck off a number of additional copies and proceeded to sell them in the form of Christmas cards. The plaintiff was granted an injunction (1) because the defendant was guilty of a breach of the contract between the parties and (2) because the defendant had failed to observe the relations of confidence established between the parties when the plaintiff consented to the taking of her photograph. This last reason for the court's decision is illustrative of a second distinct, yet kindred ground, for the granting of equitable relief. The court will always prohibit a breach of trust or an abuse of confidence and thereby prevents the disclosure of all trade and professional secrets whose divulgence is not essential to the public welfare. *Tipping* v. *Clarke,* 2 Hare, 383, 1843; *Williams* v. *Assurance Co.,* 23 Bear. 338, 1857. As the parties in the leading case were utter strangers to each other, unassociated by any privity of contract or mutual trust, the court very correctly eliminated from the discussion any reference to the two principles just mentioned.

The third and fundamental, sometimes asserted to be the exclusive, ground for equitable intervention is the protection of property rights. The suggestion at once presents itself that this idea was seriously involved in the present case. Indeed in the dissenting opinion a most earnest argument is advanced for classifying the case under this head and granting the relief sought. It is pointed out that property is not the thing itself which is owned so much as it is the right or bundle of rights which the person possesses and may exercise over such things, whether they be corporeal or incorporeal, and so it is shown that the right to be protected in the possession of a thing or the enjoyment of privileges is property and as such is entitled to protection. The legal conception of property rights has passed through a gradual evolution and process of growth rendered necessary by the new ideas involved in modern commercial life and the new forms invented and employed in business enterprise and activity. Things incorporeal and intangible with the rights carried with them have long since been recognized as constituting property of the highest value and importance.

Equity jurisprudence now contains the well-established and almost universally recognized principle that the productions of the mind are in every sense property, and as such will be protected. *Woolsy* v. *Judd,* 4 Duer, 379, 1855; *Grigsby* v. *Breckinridge,* 2 Bush. 480, 1867. The writer of a letter, which may

lack all literary qualities and therefore be entirely free from pecuniary value, possesses nevertheless a qualified property in the subject matter thereof and is entitled to have shielded from public scrutiny and criticism this humble reflection of his mental or spiritual life. *Gee* v. *Pritchard,* 2 Swanston 402, 1818, is the familiar case always cited in support of this doctrine. The property protected is not the substance upon which a communication of the author's thoughts is made, but the thoughts themselves. This truth is demonstrated in the two cases of *Abernethy* v. *Hutchinson,* 3 Law J. Ch. (O. S.) 209, 1825, and *Caird* v. *Sime,* 12 App. Cases, 326, 1887, where professors were allowed to enjoin the publication of lectures which they had orally delivered and which had been written down by some hearer and prepared for general circulation. The law therefore is prepared to protect and zealously guard for every man the verbal expressions of his mental pictures, or in other words to assure to him complete control over these creations of his thinking powers. It is difficult to distinguish, for purposes of property classification, the mental pictures of a man, represented in language, and the physical appearance of the same individual, reproduced by means of the protographer's art. The suggestion that the former are portrayals of the author's inherent nature and are therefore more peculiarly and significantly his own, reflecting his knowledge and his skill in expression, carries with it no weight. Thoughts at best are shifting, changing things, lacking frequently both exactness and permanency, and do not belong exclusively to one individual. The same idea may be shared by many. Nor does the peculiar wording in which the thought is wrapped constitute an element of distinction. Literary merit, as the New York case of *Woolsy* v. *Judd,* already cited, points out, is not essential. No matter how ungrammatical their phrasing or unscholarly their preparation the same protection is accorded alike to all letters. On the other hand nature itself has decreed that a man's face shall forever, from a physical standpoint, be the mark of his individuality. It is distinctly and absolutely his, —an inalienable possession which in all time shall never be duplicated and which by the curious working of another natural law is the faithful mirror of his inner life and character. Even his name is not so exclusively and necessarily his own since it may accidentally be borne by others and may be abandoned or altered at his own option. Perhaps one entering some field of public life impliedly consents, as suggested in *Corliss* v. *Walker,* 57 Fed. Rep. 434, 1893, to the unrestrained use of his picture as he does under modern provisions to an investigation and free discussion of his past history and present conduct. But if the thoughts expressed by a private person in an ordinary letter are to be protected on the ground that they are the peculiar property of the author, why should not that individual be equally entitled,

and on the same grounds, to prevent the most annoying and distressing uses of his own countenance which must ever stand to the world at large as the index and distinguishing stamp of his individuality? Such unbridled acts, kept by their unprincipled perpetrators safely without the bounds of libel, must necessarily reflect most seriously upon the character and general reputation of the individual in question. Lord Cottenham's statement that "a man should be protected in the exclusive use and enjoyment of that which is exclusively his" could nowhere be literally applied with greater appropriateness.

As a second distinction between the letter and lecture cases and the one under discussion, it might be urged that a man's intellectual productions are often a source of profit to him and should therefore be protected. But pecuniary value has long since been discarded as a criterion upon which the propriety of the equitable remedy is made to depend. And even if the author and prospective publisher of literary compositions is to be protected for the reason just suggested, the same principle applies with equal force to the case at hand. The face of the present plaintiff evidently has some value. Otherwise the defendant would not have persisted in its use. If monetary considerations are involved, why should the benefits be conferred entirely upon a stranger? Why should not the value of the portraiture belong exclusively to the owner thereof until its use has been granted by him to the public or some individual? Indeed, if the plaintiff in this case had alleged that she had been offered a large sum of money by an advertising agency for the exclusive use of her face, as soon as she could guarantee such exclusiveness, and had therefore prayed that the defendant be enjoined from using the face, it is difficult to forecast the result under the present decision which classifies the "right of a man to pass through the world without having his picture published," or at least to control and regulate such publication, under the general right of privacy and not within the limits of the legal conception of property.

Possibly a third differentiation that might be drawn between letters and photographs is that secrecy and privacy necessarily attach to the thoughts expressed in the former while the face of a man is exposed every time he appears in public and is therefore an open book which the world may read. Truly enough it is exposed, but not in bar-rooms and similar places nor to an extent which justifies the unlicensed spreading of likenesses thereof broadcast, and promiscuously throughout the country. A general control at least of the circumstances under which appearances are to be made should certainly in all fairness lodge in the individual who is primarily to be affected thereby.

The court having declined to recognize the defendant's offence as being embraced in any one of the three categories already

referred to, an attempt was then made by the plaintiff to introduce a new and fourth ground for equitable relief—protection of the so-called right of privacy. Indeed the long opinion rendered for the majority consisted almost wholly of an answer to this argument and in the final analysis it amounted to a denial of the previous existence of the right coupled with a refusal at the present time to bring it into being. The idea that the principle involved in all these cases where equity assumed jurisdiction was not one of private property but of an inviolate personality was therefore of course rejected. The court's action was based (1) on a failure to find precedents which would justify a different holding and (2) the probability that an acceptance of the right proposed would lead to a vast amount of litigation for imaginary or fictitious affronts, bordering even upon the absurd. A review of the New York authorities, which in any way approach the subject, shows that the question was an open one until the present judgment was rendered. In *Schuyler* v. *Curtis,* 147 N. Y. 434, 1895, where the relatives of Mrs. Schuyler, then deceased, sought to restrain the defendant from erecting a bust of that lady, relief was at first granted, the Supreme Court in three separate opinions, admitting the existence of a right of privacy. The Court of Appeals reversed the judgment, but only on the ground that a right which might under the circumstances exist in Mrs. Schuyler did not survive to her relatives and that the interference with the plaintiff's right of privacy was too indirect and trivial to be considered. *Marks* v. *Jaffa,* 26 N. Y. Supp. 908, 1893, was decided before the reversal of *Schuyler* v. *Curtis,* but, as the plaintiff was the person whose picture was about to be published and who was granted an injunction, the reason given later for setting aside the judgment in *Schyler* v. *Curtis* did not apply or overrule the case. It became therefore a more or less positive authority in favor of the existence of a right of privacy. In the later case of *Murray* v. *Engraving Co.,* 28 N. Y. Supp. 271, 1894, the court refused to enjoin the publication of a picture, but it was the picture of the plaintiff's son and not the plaintiff himself; hence the case is distinguishable. These citations have been given to reveal the fact that the court in finally deciding whether or not the immunity of the individual extended as far as the advocates of this new doctrine wished to carry it, was called upon to settle a most interesting and perplexing question and received from existing decisions little guidance or assistance, though the drift of legal sentiment seemed to be slightly opposed to the view finally adopted. Whether or not this stand against the extension of equitable relief to prevent the commission of wrongs, which would not be actionable at common law, is the wise prudence of judicial forethought and conservatism, time alone shall tell. Theoretically the court is probably correct, but it is certainly true that, aside from the non-support of the

common law, which, of course, once admitted, is conclusive, the one positive argument advanced to support its position, namely, the likelihood of multitudinous and vexatious litigation, is greatly overdrawn and magnifies the true probabilities. Facts similar to those of the leading case would seldom be repeated, and even then the granting of injunctions is largely discretionary with the court and depends upon the peculiar circumstances of the individual case.

The leading queries of the case, are whether the court could not have recognized the right infringed as a right of property and so granted the relief without involving the doctrine of privacy at all, or failing in this, have admitted the legality of the right of privacy and decided accordingly; both of these things it refused to do. Is it then true that the law can afford no redress in such a mortifying and distressing situation as the present plaintiff found herself? Incomprehensible and extraordinary as it may seem to the layman's mind the court itself has answered this question in the affirmative. As its opinion suggests, the legislature is now the only resort for citizens whose modesty and privacy may at any time be intruded upon or who may awake any morning to discover that their physical attractiveness or mental superiority has brought their face before the great world of buyers as an advertising medium. It is certainly to be hoped that the New York legislators will not fail during the coming session to render efficient service in this matter to their neighbors and constituents.

A. A., Jr.

SUICIDE AS A CRIME—LIABILITY OF PERSON ASSISTING.—In *Grace* v. *State,* 69 S. W. Rptr. 529 (Court of Criminal Appeals of Texas, June, 1902) the appellant was indicted for the murder of Mollie Lane by shooting her with a pistol. He was convicted of murder in the second degree. The prisoner had been criminally intimate with the deceased, who, in consequence of her shame, unsuccessfully attempted to take her life by taking poison. The deceased declared that, though she had not succeeded in this attempt, she would resort to other means; that she had made up her mind to take her life. Shortly afterwards on the same day the appellant came in, placed his pistol on a dresser and lay down on his bed in the room. The deceased and two others were present. After some conversation between the deceased and a Miss W., one of the others present, she, the deceased, sprang up, saying she would end it all, seized the pistol, and immediately shot herself, dying instantly. As a matter of fact the jury found that the appellant placed the pistol on the dresser with the intention that the deceased should use it to take her own life.

The indictment was based on a statute which provided that if any one prepare means by which a person may injure himself, with intent that he shall thereby be injured, he shall by the use of such indirect means become a principal. On appeal this was very properly held to only apply where the victim is not cognizant of the intent of the accused in preparing the means for the destruction of his or her life. That it only applies where the victim is the innocent agent of the person providing such means and not where the deceased acted of his or her own volition and with guilty knowledge.

Then the question arose as to whether the appellant was guilty at common law and the decision of the court in this connection is not easily reconciled with reason and sound logic. It was held "not to be a violation of any law in Texas for a person to take his or her own life. That so far as the law is concerned, the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law." Judgment was reversed.

Bishop on Criminal Law, Sec. 1187, says: "The same principle which forbids one to take the life of another prohibits equally the taking of his own life. Therefore self-murder, or suicide, like any other murder, is a common law felony. But as no penalty other than the forfeiture of goods, and of personalty generally, which was the common law punishment, 1 Hawkins, P. C., C. 27, Sec. 7, 8, can be inflicted on him who has murdered himself, and as forfeitures for crime are not practiced in our states, this offence is practically not punishable with us. *Com.* v. *Bowen,* 13 Mass. 356, 1816. It is the same where one kills another and dies; though he has committed murder, our law cannot punish him." It is to be noted that though suicide is not punishable it is none the less a crime; to hold otherwise would produce some very singular consequences. Suicide is not only a crime but it is a crime requiring an intent to kill. Take away the intent and you have the victim acting as the innocent agent of another, or of the instigator of the crime, and it is murder and not suicide. Such cases would fall directly within the Texas statute as interpreted in the case under discussion. But if suicide is not a crime then how can you carry over the intent to commit suicide to other crimes actually committed? If suicide is not unlawful as held in *Grace* v. *State,* then had the deceased in the attempt to kill herself, killed another, she would not have been guilty of homicide. It would have been a mere accident.

Com. v. *Mink,* 123 Mass. 422, 1877, is directly in point. Here the defendant in an attempt to kill herself accidentally killed another, who interfered to prevent the suicide. Gray, C. J., said the life of every human being is under the protection of the law, and cannot be lawfully taken by himself, or by another with his

consent, except by legal authority. By the common law of England, suicide was considered a crime against the laws of God and man. That one who persuades another to kill himself and is present when he does so, is guilty of murder as a principal in the second degree. *Com.* v. *Bowen,* 13 Mass. 355, 1816. This case was affirmed in *Com.* v. *Dennis,* 105 Mass. 162, 1870. Thus if two mutually agree to kill themselves together, and the means employed to produce death take effect upon one only, the survivor is guilty of the murder of the one who dies. It was further said that it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his or her death, is guilty of criminal homicide.

In *State* v. *Levelle,* 34 S. C. 120, 1890, it was said that in the eye of the law self-destruction—suicide—is an offence, it is an unlawful act, and if a man with a deadly weapon undertakes to take his own life, he is doing an unlawful act, and if in the commission or attempted commission of that act he takes the life of an innocent party standing by, then, in the eye of the law, that is murder. In 1 *Russel on Crimes,* 424 (third Am. ed.) it is said: "Whenever an unlawful act, an act *malum in se* is done in the prosecution of a felonious intention, and death ensues, it will be murder." Now, as suicide is an unlawful act, *malum in se,* and is a felony (1 *Bishop Cr. Law,* Sec. 511-615) there can be no doubt that the proposition laid down is *State* v. *Levelle* is correct.

It is usually held, except where modified by statute as in Massachusetts, that the commission of mayhem on one's self, or attempt to commit suicide, is a misdemeanor, on the ground that one cannot consent to that which is a crime against the state. 1 *Bishop Cr. Law,* Sec. 259-2—*U. S.* v. *Distillery,* 8 *Benedict,* 473, 1876. Now if the completed act is not a crime how can the attempt to commit it or the partial commission of it be an offence? Yet such would be the consequence of holding that suicide is not a crime. There does not seem to be any difficulty in the cases in holding that suicide is an unlawful act when it results in some other crime and punishment is possible; therefore, the fact that it is unlawful should not be lost sight of merely because punishment is not possible. As is pointed out by Bishop, to hold thus would be to say that where one commits murder and dies there is no crime because no punishment is possible.

In *Grace* v. *State* the judge goes on and states that "there is no evidence showing that the prisoner placed the pistol on the dresser for the purpose or with the intent that deceased should use it in inflicting the fatal wound." If as was previously stated in the same opinion, suicide is no crime, then it is certainly of no importance to discuss intent because nothing short of actual

use of the pistol by the appellant would have made him guilty. The learned judge does not seem to have been entirely satisfied with his own conclusion.

From the review of the authorities and the application of reason it can hardly be doubted that suicide is a crime at common law, hence in the case under discussion it would seem that if the prisoner intentionally assisted by furnishing means for, and was present at the time of, the suicide, he was a principal. But if, as was held in the latter part of the opinion, the evidence did not support the finding of guilty intent, then, however erroneous may have been the reasons given, the ultimate decision seems correct. *J. B. T.*